(13)

Supreme Court, U.S.
FILED
AUG 13 2002
OFFICE OF THE CLERK

No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

JOINT APPENDIX

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ROBERT R. ANDERSON
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*These items, which appear in the Appendix to the Petition for Writ of Certiorari (Pet. App.), at the pages indicated, are omitted from the Joint Appendix pursuant to Rule 26.1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 21, 1996 – Andrade convicted in the Superior Court of the State of California for the County of San Bernardino.

May 13, 1997 – Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, affirming Andrade's convictions.

July 23, 1997 – Order of the California Supreme Court denying Andrade's petition for review of the Court of Appeal's Opinion.

August 19, 1998 – Andrade's Petition for Writ of Habeas Corpus, filed in the United States District Court, Central District of California – Western Division.

February 18, 1999 – Judgment of the United States District Court, dismissing Andrade's petition with prejudice.

April 29, 1999 – Andrade's request for a certificate of appealability.

August 26, 1999 – Order of the United States Court of Appeals for the Ninth Circuit granting Andrade's request for a certificate of appealability.

April 30, 2000 – Andrade's motion for appointment of counsel.

June 28, 2000 – Order of the United States Court of Appeals for the Ninth Circuit denying Andrade's motion for appointment of counsel.

October 30, 2000 – Order of the United States Court of Appeals for the Ninth Circuit vacating submission of the appeal.

November 1, 2000 – Order of the United States Court of Appeals for the Ninth Circuit appointing pro bono counsel to represent Andrade and ordering supplemental briefing.

November 2, 2001 – Opinion of the United States Court of Appeals for the Ninth Circuit filed.

FELONY COMPLAINT IN CASE FWV09140

SAN BERNARDINO COUNTY
MUNICIPAL COURT DISTRICT
WEST VALLEY DIVISION
COUNTY OF SAN BERNARDINO
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	REFILING OF FWV08781
vs.	)	FELONY COMPLAINT
LEANDRO ANDRADE, Defendant	)	

The undersigned is informed and believes that:

COUNT 1

On or about November 4, 1995, in the above named Judicial District, the crime of PETTY THEFT WITH A PRIOR, in violation of PENAL CODE SECTION 666, a Felony, was committed by LEANDRO ANDRADE, who did willfully and unlawfully steal, take, and carry away the personal property of another, to wit, K-Mart, said defendant having been previously convicted of the crime of petit theft on March 7, 1990 in the Municipal Court of the Fullerton Judicial District of the State of California and having served a term therefor in a penal institution and having been imprisoned therein as a condition of probation for said offense.

It is further alleged as to Count(s) one, pursuant to Penal Code sections ll70.12(a) through (d) and 667(b) through (i) that the defendant, LEANDRO ANDRADE, has suffered the following prior conviction(s) of serious or violent felonies or juvenile adjudications: The crime of (1) Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894 ; Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of california, for the county of San Joaquin, Case Number 33894 ; (3) Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894.

* * * * *

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

Further, attached hereto and incorporated herein are official reports and documents of a law enforcement agency which the undersigned believes establish probable cause for the arrest of defendant(s) LEANDRO ANDRADE, for the above-listed crimes. Wherefore, a warrant of arrest is requested for LEANDRO ANDRADE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT CONSISTS OF 1 COUNT(S).

Executed at Rancho Cucamonga, California, on January 9, 1996

/s/C. Cook
C. COOK
DECLARANT AND COMPLAINANT

AGENCY: ONPD PRELIM TIME EST.:

DEFENDANT	CII NO.	DOB
ANDRADE, LEANDRO		6/06/58

BOOKING NO.	BAIL RECOM'D	CUSTODY RTN DATE

NCIC

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

FWV09140

FELONY COMPLAINT - ORDER HOLDING
TO ANSWER - P.C. SECTION 872

It appearing to me from the evidence presented that the following offense(s) has/have been committed and that there is sufficient cause to believe that the following defendant(s) guilty thereof, to wit:

(Strike out or add as applicable)

LEANDRO ANDRADE

COUNT NO.	CHARGE	SPECIAL ALLEGATION
1	PC666	PC1170.12(a)-(d)

I order that defendant(s) be held to answer therefor and be admitted to bail in the sum of:

LEANDRO ANDRADE _____ Dollars

and be committed to the custody of the Sheriff of San Bernardino County until such bail is given. Date of arraignment in Superior Court will be:

LEANDRO ANDRADE _____ in Dept: __
at: _____A.M.

Date: _____

_____
Committing Magistrate

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

It appearing that the defendant, LEANDRO ANDRADE personally and through his attorney _____ _____, has this date pursuant to Section 859a of the Penal Code, State of California, entered a plea of GUILTY to the charge of _____ _____ _____, a Felony, I order that he be certified to the Superior Court of this County for such further proceedings as may be required by law. It is further ordered that the defendant be admitted to bail in the sum of $_____, and to be committed to the Sheriff of the said County of San Bernardino until he gives such bail. And it is further ordered that the defendant LEANDRO ANDRADE appear in Department No. _____, San Bernardino County Superior Court on the _____ day of _____, 19_____, at _____M.

Dated this _____day of _____ 19_____.

_____
Committing Magistrate

INFORMATION FILED IN CASE FWV08781

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	INFORMATION
LEANDRO ANDRADE, Defendant	)	Arraignment Date: 12/20/95 Department 5

INFORMATION SUMMARY

Ct. No.	Charge	Charge Range	Defendant	Special Allegation	Alleg. Effect
1	PC666	16-2-3	ANDRADE, Leandro	PC667 (b)-(i)	MSP Check

The District Attorney of the County of San Bernardino, by this Information alleges that:

COUNT 1

On or about November 18, 1995, in the County of San Bernardino, State of California, the crime of PETTY THEFT WITH A PRIOR, in violation of PENAL CODE SECTION 666, a Felony, was committed by LEANDRO ANDRADE, who did willfully and unlawfully steal, take, and carry away the personal property of another, to wit, K-Mart, said defendant having been previously convicted of the crime of petit theft on March 7, 1990 in the Municipal Court of the Fullerton Judicial District of the State of California and having served a term therefor in a penal institution and having been imprisoned therein as a condition of probation for said offense.

It is further alleged as to Count(s) one pursuant to Penal Code section 667(b) through (i) that the defendant, LEANDRO ANDRADE, has suffered the following prior conviction of a serious or violent felony or juvenile adjudication: The crime of Residential Burglary, 3 counts in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894.

* * * * *

Pursuant to Penal Code Section lO54.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

THIS INFORMATION CONSISTS of 1 COUNT(S)

DENNIS L. STOUT
DISTRICT ATTORNEY
County of San Bernardino
State of California

By: /s/ David Bristow
DAVID BRISTOW
DEPUTY DISTRICT ATTORNEY

filed in Superior Court
County of San Barnardino
DATED:

SUPERIOR COURT ORDER GRANTING JOINT MOTION TO CONSOLIDATE CASE NUMBERS FWV0871 AND FWV09140

SUPERIOR AND MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
CRIMINAL MINUTE ORDER-2

ACIS Case No: Date: 3-13-96 Time: 8:30AM
Case No:FWV08781 Judge: Joan M. Borba
Clerk: Kristel Terry
Baliff: Blaine Proctor
Reporter: L. Miakovich
Counsel: DDA Ruzkowski
DPD Cruz

CASE TITLE: People v. Andrade, Leandro

CASE CUSTODY: ☐ OR ☒BAIL☐ CUSTODY
☐ FUGITIVE ☐ PROBATION _____

NATURE OF PROCEEDINGS:
☐ READINESS CALENDAR ☐ PRETRIAL CONFERENCE
☒ RECALL CALENDAR ☐CHANGE OF PLEA AT TIME OF _____
☐ DEFENDANt"S ☐ PEOPLE'S MOTION TO DISMISS PER 995 P.C. ☐ MOTION TO SUPPRESS EVIDENCE PER 1538 P.C. ☐OTHER: _____

Codes Omitted
□ Public Defender □ Appointed □ (A) Relieved
□ Attorney _____ _____
□ Retained □ (B) Appointed □ (E) Relieved
□ Interpreter _____
□ sworn □ ½ □ 1 Day
□ On Motion of: Court Trial is ⊠ (A) Trailed
⊠ to be ⊠ (B) Recalled on 3-18-96 at 10:30 AM
in Dept. A.
□ Action assigned to commence on _____
at _____ in Court _____
□ in Department _____ for
□ Jury Trial □ (A) Court trial.

□ Counsel stipulate Court may read and consider preliminary transcripts

---

Codes Omitted
□ PC 995 Motion held SCM02
□ PC 1538.5 Motion □ (A) Granted
□ Pretrial held SCCNF ⊠ Conference held
□Motions off calendar - - no briefs filed
□ Motion _____
□ 995 P.C. Motion (SCX 10)
□ 1538.5 P.C. Motion □ Granted □ (B) Denied
□ (E) Without prejudice □ (F) With prejudice
□ (G) Submitted
□ Motion to amend Complaint/Information
□ (A) Granted □ (B) Denied □ (c) waives any defects
□ (A) Amended information is ordered filed
□ (B) Defendant waives arraignment on amended information/complaint
□ Defendant waives Arbuckle rights

Codes Omitted
□ BY LEAVE OF COURT, Defendant personally and by counsel withdraws plea of not guilty to counts(s)
_____
□ Defendant is informed of the elements of the charge(s) □ Factual basis established
□ Defendant pleads □(A) Guilty □ (B) Guilty per Plea Bargain (incorporated by reference herein)
□ (C) Nolo Contender with consent
□ See filed Plea Form re: Courts inquiries, advisals of District Attorney and findings and agreements, approval of court
□ (D) To all charges and counts as alleged
□ (E) _____
□ Pleas to Felony SCX Pleas to Misd 17b
□ Pleas to Misd - other
□ Court finds Boykin & Tahl rules complied with

Codes Omitted
□ Defendant waives statutory time for:
□ (A) SCWVR Trial to _____
□ Sentencing
□ Defendant applies for Probation
□ (A) Ordered to report to Probation Officer
□ Referred to Probation Officer for presentence investigation and report
□ Defendant order to □ (A) Report to Probation Officer forthwith □ (B) Appear on hearing date
□ Defendant fails to appear as previously ordered
□ Court finds good cause for defendants absence and reserves jurisdiction over bailbond.

Codes Omitted
- ☐ Bench Warrant order recalled
- ☐ Quashed prior to issuance
- ☐ Bail/Bond exonerated
- ☐ Bench Warrant ordered issued
- ☐ Held until _____
- ☐ Bail/Bond forfeited

Codes Omitted
- ☐ Existing dates confirmed
- ☐ Estimated Trial Time _____
- ☐ Vacate _____ ☐ Reset _____
- ☐ Defendant released as to this action only
- ☐ On own recognizance upon signing agreement to appear
- ☐ Court takes Cruz Waiver from defendant
- ☐ Defendant remanded to lower Court.
- ☐ Action continued to ___ at ___ in Court _____ in Dept./Div. _____ for _____
- ☐ On motion of the District Attorney ____ dismissed.
- ☐ (A) in furtherance of justice ☐ (B) Per Plea Bargain
- ☐ (C) Pursuant to insufficient evidence to prosecute
- ☐ (D) _____
- ☒ Case custody ☐ Remains
- ☒ (A) Changes to Custody

SUPERIOR AND MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
MISCELLANEOUS MINUTE ORDER- ____

CASE NAME: ANDRADE, Leandro
ACIS CASE NO: _____
____ : FWV08781 Date: 3-13-96 Department: A___

Codes Omitted
- ☒ Court orders the defendant remanded defendant remanded into custody and increases bail to the amount of $50,000.00, over defense objection. Defense request for a stay to allow defendant until 3-18-96 to post additional bail bond denied.

People and Defense joint motion to consolidate case FWV 09140 with case FWV 08781 is granted.

People to supply discovery for case FWV09140 to Defense today.

Defense motion to strike expert witnesses testimony re: fingerprints is taken under submission.

Counsel ordered to return at 10:30 a.m. on 3-18-96 for pre-trial conference with jury selection commencing at 2:00 p.m.

VERDICTS AND SPECIAL FINDINGS

Filed in Court on Mar 21 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	VERDICT I-A
vs.	)	
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the defendant, LEANDRO ANDRADE, GUILTY of the crime of PETTY THEFT, as charged in the Information, as to Count I.

DATED: March 21, 1996

/s/ Deborah Freeman
Foreperson

Filed in Court on Mar 21 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	VERDICT I-A
vs.	)	
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the defendant, LEANDRO ANDRADE, GUILTY of the crime of PETTY THEFT, as charged in the Information, as to Count II.

DATED: March 21, 1996

/s/ Deborah Freeman
Foreperson

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, I-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code Section 459, when he entered a residence to commit a theft located at 3591 Quail Lakes, No. 275, Stockton, California, to be TRUE, as to Counts I and II.

Dated:

/s/ Bridgit F. George 3/27/96

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, II-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime ofFIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, when he entered a residence to commit a theft located at 6415 Cumberland, Stockton, California, to be TRUE, as to Counts I and II.
Dated:

Dated:

/s/ Bridgit F. George 3/27/96

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, III-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, when he entered a residence to commit a theft located at 2101 Rosemarie, No. 148, Stockton, California, to be TRUE, as to Counts I and II.

Dated:

/s/ Bridgit F. George 3/27/96

PROBATION REPORTS
SAN BERNARDINO COUNTY PROBATION
DEPARTMENT PROBATION OFFICER'S REPORT

Defendant's Name	Court	Judge	Court No.
LEANDRO ANDRADE	WVRTC-RC Dept. A	Joan M. Borba	ACIS - F0129056
Address	**Hearing Date**	**Attorney**	**Prob. No.**
1182 E. Grand Ave., #1 Ph. 469-9260	4-24-96	C. Cruz	0066971

Birth Date	POB	Nationality
6-6-58 AGE 37	Los Angeles, CA	American

Convicted By	Conviction Date	Court/Conv
Jury	3-27-96	WVRTC-RC, Dept. A

Ht	Wt	Eyes	Hair	Ethnic	Sex
5'8"	190	Brn	Black	Hispanic	Male

Arresting Agency	Booking Agency
Montclair PD	WVDC

SSN	BI	FBI	Custody Status
565-04-4467	A05468524	480657V9	Custody

Driver's License	State	Status	Convicted Charges
V8090170	CA	Valid	PC666; Petty Theft with a Prior, Felony PC 667(b) through (i)

Scars, Tatoos, Other Marks	Plea Agreement
Tatoos - Right Arm & Shoulder	N/A -Found Guilty by jury

Booking No.	Arrest Date	Release Date	Days
9511341642	11-18-95	1-23-96	67
9603341199	3-13-96	In Custody	42
Total Custody Days		Count 1	109*

PERSONAL HISTORY

(Not Independently Verified by Probation Department)

Education	Military	Special training
GED	U.S. Army**	Refrigeration

Health	Drugs/Alcohol/Medications
Good	Heroin

Treatment History	Employer
1993-Loma Linda V.A. Hosp. 6 mos	Unemployed

Time On Job	Income	Type of Work	Marital Status
N/A	None	Refrigeration	Single

Spouse	Children	Assets, Debts, Child Support
N/A	3	None

Contact Person: 629-9683 Marcy Gloria Andrade

Father (Name, Address, Ph.)	Mother (Name, Address, Ph.)
Inncent Andrade - Deceased	Leoanrda Varrbra 751 San Francisco Pomona, CA 629-4441

Additional Information: ** 9-years

Face Sheet Taken By: Vicky Foulks Extension: 945-4019

Date: 4-23-96

FWV 08781 ANDRADE, LEANDRO April 23, 1996

PRIOR RECORD: According to the California Bureau of Identification, the Department of Motor Vehicles, and the Federal Bureau of Investigation, the defendant has the following prior record:

DATE	AGENCY	OFFENSE	DISPOSITION
7-25-81	Pomona PD	1) H&S11350(a) 2) PC 484(a)	1-20-82 (A525050) 1) Drug Diversion 2) Convicted - misd 12 mon prob./ 6 days jail
11-30-82	Stockton SO	PC 459 10 counts	4-26-83: (32894) Convicted PC 459 felony 32 months prison 5 additional counts - 88 months prison
11-17-88	LaTuna Fed. Correctional Facility	Transportation of Marijuana	U.S. probation - Sacramento Convicted - felony 8 years prison
2-5-90	Fullerton PD	PC 666	3-7-90: Convicted PC 488 - misd 180 days jail
9-12-90	Lompoc Fed. Correctional	Transportation of Marijuana	9-12-90: Convicted - felony

	Facility		2191 days in federal prison
9-30-91	Santa Ana	Escape	11-5-91: Parole violation - returned to finish term 2-8-93: paroled

CIRCUMSTANCES OF THE OFFENSE: Specifics of the criminal offense and arrest of the defendant are detailed in the Montclair Police Department reports. The offense of Petty Theft with a Prior occurred on November 18, 1995. The defendant was arrested on November 18, 1995, and charged by the District Attorney's Office with Petty Theft with a Prior, in violation of Section 666 of the Penal Code, a Felony, Count 1, with special allegation of PC 667(b) through (i), Prior Serious Felonies.

Officers responded to K-Mart regarding a shoplifter in custody. Security watched the defendant place four videos in his rear waistband of his pants. The defendant exited the store not paying for the items. A uniformed security guard stopped the defendant outside the store. He was escorted back into the security office. He was arrested and booked at the West Valley Detention Center.

DEFENDANT'S STATEMENT: The defendant was interviewed on April 4, 1996, at the West Valley Detention Center. The defendant admitted committing the offense. The defendant further stated he went into the K-Mart Store to steal videos. He took four of them to sell so he could buy heroin. He has been a heroin addict since 1977. He says when he gets out of jail or prison he always does something stupid. He admits his addiction controls his life and he steals for his habit.

VICTIM'S STATEMENT: The victim in this matter is K-Mart Store who received their merchandise back at the time of the defendant's arrest.

COLLATERAL REPORTS: No collateral information has been received in this case.

SENTENCING CONSIDERATIONS:

Probation Eligibility (Rule 413):

Statutory provisions limiting or prohibiting a grant of probation in this matter do exist. Specifically, PC 1203(e)(4) in that the defendant has been convicted twice in the State of California of a felony.

Criteria Affecting Probation (Rule 414):

(a) Facts relating to the crime include:
(5) The degree of monetary loss to the victim was insignificant.
(8) The manner in which the crime was carried out demonstrated criminal sophistication and/or professionalism on the part of the defendant.

(b) Facts relating to the defendant include:
(1) The defendant does have a prior record of criminal conduct. That prior record does indicate a pattern of regular or increasingly serious criminal conduct.
(2) The defendant's prior performance on parole was unsatisfactory. The defendant was not on a grant of parole at the time he committed the present offense.
(5) Imprisonment will not seriously affect the defendant.
(6) A felony conviction will not adversely affect the defendant's life.

(7) The defendant has shown remorse.

Circumstances in Aggravation (Rule 421):

(a) Facts relating to the crime include:
(8) The manner in which the crime was carried out indicates planning, sophistication or professionalism.

(b) Facts relating to the defendant include:
(2) The defendant's prior convictions as an adult are numerous, and of increasing seriousness.
(3) The defendant has served a prior prison term.
(5) The defendant's prior performance on parole was unsatisfactory.

Circumstances in Mitigation (Rule 423):

(b) Facts relating to the defendant include:
(3) The defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process.

Enhancements:

Special Allegation or Enhancement of PC 667(b) through (i) was pled and proven. For the impact this Special Allegation has upon the defendant's custody time, the Court's attention is respectfully referred to the Probation Officer's Recommendation.

ANALYSIS: The defendant admits he is a heroin addict. He admits heroin controls his life. He was originally sent to prison in 1983 for several counts of burglay. He continued to have theft and drug problems. He continues to be a threat to the community. He is unemployed and does not help take care of his three children. He cannot take care of himself or anyone else. He admits it is wrong to steal but cannot help himself as he needs money for heroin.

This is the defendant's third strike and the probation officer

is bound by the law to recommend a sentence of twenty-five years to life as a result of the defendant's conviction and prior record.

As such, the following recommendation is made by the Probation Department.

CVC 13350 RECOMMENDATION: It is respectfully recommended the Court find a motor vehicle was not used in the commission of this offense.

REIMBURSEMENT OF APPOINTED COUNSEL: It is respectfully recommended the Court find that the defendant does not have the present ability to pay appointed counsel fee.

REIMBURSEMENT OF INVESTIGATION COSTS: It is respectfully recommended the Court find the defendant does have the present ability to pay the cost of conducting the Presentence Investigation and preparing of the Court Report pursuant to Section 1203.1b of the Penal Code. It is therefore recommended the defendant be ordered to pay $504.00 through the Central Collections.

REIMBURSEMENT OF ARRESTING AGENCY: It is respectfully recommended that the Court order the defendant to reimburse the City of Montclair, 5111 Benito St., Montclair, Ca. 91763, Attn: Finance Division pursuant to Government Code 29550.1, in the amount of $152.00 and show proof of payment to Probation Officer within ninety (90) days from release from custody.

RESTITUTION FINES: It is therefore respectfully recommended that the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.4 in the amount of $5,000.00, to be collected by the Department of Corrections.

It is further recommended that the defendant, Leandro Andrade, be ordered to pay a restitution fine, pursuant to PC 1202.45, in the amount of $5,000.00. It is further recommended

parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

PROBATION OFFICER'S RECOMMENDATION: It is therefore respectfully recommended that probation be denied and the defendant, Leandro Andrade, be sentenced to the California State Prison for the term of twenty-five (25) years to Life for the offense of Petty Theft with a Prior, in violation of Section 666 of the Penal Code, a Felony, with the SPECIAL ENHANCEMENT of 667(b) through (i) found TRUE.

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of one hundred nine (109) actual days, plus fifty-four (54) conduct days, for a total of one hundred sixty-three days and may be followed by parole for a period of three (3) to four (4) years.

Respectfully submitted,
RAYMOND B. WINGERD
CHIEF PROBATION OFFICER

By:
/s/ Vicky Foulks
Probation Officer II

AF:ef

APPROVED:

/s/ Jon R. Allender
Jon R. Allender
Supervisor

I hereby certify that the Probation Officer's Report and Recommendation in this matter has been read and considered by me on this 23rd day of Apr., 1996.

/s/ Joan M. Borba
Judge of the West Valley Regional Trial Court,
In and for the County of San Bernardino,
State of California

SAN BERNARDINO COUNTY PROBATION
DEPARTMENT PROBATION OFFICER'S REPORT
Filed in Court on Apr 24 1996

Defendant's Name	Court	Judge	Court No.
LEANDRO ANDRADE	WVRTC-RC Dept. A	Joan M. Borba	FWV08781 ACIS - F0129056

Address	Hearing Date	Attorney	Prob. No.
1182 E. Grand Ave., #1	4-24-96	C. Cruz	0066971

Birth Date	POB	Nationality
6-6-58	Los Angeles, CA	American

Convicted By	Conviction Date	Court/Conv
Jury	3-27-96	WVRTC-RC, Dept. A

Ht	Wt	Eyes	Hair	Ethnic	Sex
5'8"	190	Brn	Black	Hispanic	Male

Arresting Agency	Booking Agency
Montclair PD	WVDC

SSN	BI	FBI	Custody Status
565-04-4467	A05468524	480657V9	Custody

Driver's License	State	Status	Convicted Charges
V8090170	CA	Valid	PC666; Petty Theft with a Prior, Felony – 2 counts

Scars, Tatoos, Other Marks	Plea Agreement
Tatoos - Right Arm & Shoulder	N/A -Found Guilty by jury

Booking No.	Arrest Date	Release Date	Days
9511341642	11-18-95	1-23-96	67
9603341199	3-13-96	In Custody	42
Total Custody Days		Count 1	109*

PERSONAL HISTORY
(Not Independently Verified by Probation Department)

Education	Military	Special training
GED	U.S. Army**	Refrigeration

Health	Drugs/Alcohol/Medications
Good	Heroin

Treatment History	Employer
1993-Loma Linda V.A. Hosp. 6 mos	Unemployed

Time On Job	Income	Type of Work	Marital Status
N/A	None	Refrigeration	Single

Spouse	Children	Assets, Debts, Child Support
N/A	3	None

Contact Person: 629-9683 Marcy Gloria Andrade

Father (Name, Address, Ph.)	Mother (Name, Address, Ph.)
Vincent Andrade - Deceased	Leoanrda Varrbra 751 San Francisco Pomona, CA 629-4441

Additional Information: ** 9-years

* Count 2: 9511240406 11-4-95 11-7-95 4 days
Per the D.A., this count was first filed under FWV 09140. She made an oral agreement in court to refile this count under FWV 08781

Face Sheet Taken By: Vicky Foulks Extension: 945-4019
Date: 4-23-96

PROBATION OFFICER'S SUPPLEMENTAL REPORT
LEANDRO ANDRADE
In custody
April 24, 1996
Attorney: Christian Cruz

FWV08781
0066971

CIRCUMSTANCES OF THE OFFENSE:
COUNT 2: On March 27, 1996, the defendant was found guilty by jury trial of two unrelated counts of PC 666, Petty Theft with a Prior, both Felonies. The jury also found true the allegation of PC 667(B) through (i), three prior serious felonies. The case was then referred to the probation officer for a presentence investigation and report.

The original Amended Information filed by the district attorney reflected that Count 1, however, made no mention of Count 2 which reportedly was orally consolidated into this case in court by agreement of the district attorney and public defender.

Consequently, the probation officer was unaware of Count 2 when the original probation report was prepared as the minute order dated March 27, 1996, also did not reflect a jury finding as to Count 2.

The purpose of this supplemental report is to submit a corrected face sheet and recommendation.

FWV08781 ANDRADE, LEANDRO April 24, 1996
RESTITUTION FINES: It is therefore respectfully recommended that the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.4 in the amount of ~~$10,000~~ $200.00 to be collected by the Department of Corrections for the offenses of Petty Theft with a Prior, a Felony, 2 counts.

It is further recommended the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.45 in the amount of ~~$10,000~~ $200.00. It is further recommended that said order be suspended pending successful completion of parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

PROBATION OFFICER'S RECOMMENDATION: It is respectfully recommended that probation be denied and the defendant, Leandro Andrade, be sentenced to the California State Prison as follows:

Count 1: Petty theft with a Prior, in violation of Section 666 PS With Special enhancement of PC 667 (b) through (i) found true ..... 25 years to Life

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of one hundred nine (109) actual days, plus fifty-four (54) conduct days, for a total of one hundred sixty-three (163) days and may be followed by parole for a period of five (5) to seven (7) years.

Count 2: To be consecutive to above; Petty Theft with a Prior, in violation of Section 666 PC with special enhancement of PC 667(b) through (i) found true ..... 25 years to Life

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of four (4) actual days, plus two (2) conduct days, for a total of six (6) days and may be followed by parole for a period of five (5) to seven (7) years.

Pursuant to PC § 667 (e)(12)

FWV08781 ANDRADE, LEANDRO April 24, 1996

Respectfully submitted,

RAYMOND B. WINGERD
CHIEF PROBATION OFFICER

By: /s/ Vicky Foulks
Probation Officer II

VF:ef

APPROVED:

/s/ Jon R. Allender
Jon R. Allender
Supervisor

I hereby certify that the Probation Officer's Report and Recommendation in this matter has been read and considered by me on this 24th day of Apr. 1996.

/s/ Joan M. Borba
Judge of the West Valley Regional Trial Court
In and For the County of San Bernardino,
State of California

TRANSCRIPT OF SENTENCING HEARING

[454] RANCHO CUCAMONGA, CALIFORNIA
WEDNESDAY, APRIL 24, 1996; 9:07 A.M.
DEPARTMENT A (RC) HON. JOAN M. BORBA, JUDGE

APPEARANCES:

(Appearances as heretofore noted.)
(Lynette Milakovich,
Official Reporter, C-5098.)

THE COURT: People versus Andrade, FWV-08781. Please state your appearances.

MR. CRUZ: C. Christian Cruz for Mr. Andrade who is present in custody, your Honor.

MS. RUSZKOWSKI: Agnes Ruszkowski on behalf of the People, your Honor.

THE COURT: All right. Please proceed, Ms. Ruszkowski.

MS. RUSZKOWSKI: Thank you, your Honor.

The Court asked me to respond to a motion filed by defense counsel entitled an Arrest of Judgment, and People begin by pointing out the use note to CALJIC 17.26.

The use note indicates that it is the committee's position that whether a prior conviction was a felony or misdemeanor or a serious or violent felony is an issue of law for the Court to determine. The jury's role is to determine whether this defendant was previously convicted of a particular crime regardless of its characterization

as a serious or violent one.

In this case the jury returned three special findings or verdict forms indicating that they found that on or [455] about April 26, 1983, the defendant was convicted of first degree residential burglary in violation of Penal Code Section 459 when he entered a residence to commit a theft located – and there's various addresses.

Prior to court today, this Court already made a specific finding that all three prior convictions qualify under the three strikes law because they fit the definition of Penal Code Section 1192.7(c)(18), which is burglary of an inhabited dwelling.

Counsel's motion entitled Arrest of Judgment is really a motion asking this Court to reconsider its prior finding. And from what the People can glean, the basis of counsel's motion is two fold: One, that the People did not prove that the alleged burglaries were one of inhabited dwellings and, two, committed at nighttime, and that therefore they should not be treated as strikes pursuant to Penal Code Section 667(d)(1)/1192.7(c)(18).

The People strongly disagree. The People still feel that these priors should be treated as strikes pursuant to Penal Code Section 667(d)(1) and 1192.7, and again the question before this Court is one of law for this Court to decide.

In deciding whether these three priors meet the criteria of being serious felonies as defined in Penal Code Section 1192.7, the Court is allowed to look at the entire record, and I do have case law for the Court with specific citations.

In People versus Guerrero, G-u-e-r-r-e-r-o, a [456] 1988 California Supreme Court decision, 44 Cal. 3d 343, the Supreme Court specifically held that in determining the truth of a prior conviction, the trial Court may look to the entire record of that conviction, and therefore it was proper for the trial Court to look beyond the judgments to determine whether the defendant's prior conviction – or prior convictions were for residential burglary.

Subsequent case law that has interpreted People versus Guerrero has specifically allowed the Court to look at the following things: One, the abstract of judgment; that case is People versus Colbert, C-o-l-b-e-r-t, 1988 case, 198 Cal. Ap[p]. 3d, 924 at page 930; two, the charging document and the change of plea form, and that's People versus Carr, C-a-r-r, a 1988 case, 204 Cal. Ap[p]. 3d 774 at page 778; three, the defendant's admission and a Tahl form and transcripts of the sentencing hearing.

THE COURT: What was the last part of the Carr cite, please?

MS. RUSZKOWSKI: 204 Cal. Ap[p]. 3d 774 at page 778.

THE COURT: Thank you.

MS. RUSZKOWSKI: Three, the defendant's admission in a Tahl waiver form and transcripts of the sentencing hearing; that's People versus Smith, 1988, 206 Cal. Ap[p]. 3d 340 at page 345; four, a minute order reflecting a no contest plea; that's People versus Harrell, H-a-r-r-e-l-l, a 1989 case, 207 Cal. Ap[p]. 3d, 1439 at page 1444; [457]

five, Penal Code Section 1203.1, statements of use by the judge and the prosecutor; that's People versus Johnson, 1989, 208 Cal. Ap[p]. 3d 19 at page 25;

six, the defendant's admissions in a probation report; People versus Garcia, 1989, 216 Cal. Ap[p]. 3d, 233 at page 237;

seven, the defendant's admissions in the transcript of a change of plea hearing; that's People versus Abarca, A-b-a-r-c-a; I don't have the year, but it's 233 Cal. Ap[p]. 3d at page 1351; and, eight, rap sheets are admissible to prove the fact rather than the substance of the prior, and that's People versus Dunlap, D-u-n-l-a-p, a 1993 case, 18 Cal. Ap[p]. 4th, 1468.

I would also point out to the Court that subsequent case law has also found certain documents not part of the record of conviction, and that would be, one, the Department of Corrections commitment, and that's People versus Rhoden, R-h-o-d-e-n, a 1989 case, 216 Cal. Ap[p]. 3d, 1245, and, two, the state and local rap sheets in order to prove the substance of a prior, and that would be People versus Mathews, 1991, 229, Cal. Ap[p]. 3d, 930.

THE COURT: One more time with that citation, please.

MS. RUSZKOWSKI: 229 Cal. Ap. 3d 930. In this case the People submitted court documents from the Superior Court of San Joaquin in order to prove the prior convictions. I don't recall what exhibit [458] number they were, but they consisted of several different pages and different sheets. It consisted of, one, an information, two, a minute order dated March 28, 1983.

And if the Court were to review the minute order dated March 28, 1983, the Court would see that the Court fixed the degree of the offense as first degree, and there is a box checked at 30524, and under People versus Harrell, H-a-r-r-e-l-l, previously cited, a minute order is something the Court can look at.

Besides the information and the minute order, there is also a transcript

of a plea dated March 28th, 1993, and there was a factual basis taken for the plea based on the preliminary hearing transcript which the Court had reviewed. And pursuant to People versus Abarca, previously cited, that is something also the Court can consider.

Also there was an abstract of judgment, and pursuant to People versus Colbert, that is admissible. And the abstract of judgment specifically fixes the offense as first degree residential burglary for all four of those counts, referring to Counts 4, 5, and 6.

Finally, there's a sentencing transcript dated April 26, 1983 which also makes clear that this is a first degree residential burglary pursuant to People versus Smith, previously cited, the Court can consider the sentencing transcript.

And I would point out on page three of the sentencing transcript, defense counsel indicates, lines 18 through 24, "Okay, fine, I would just like then the [459] probation officer's official report that is filed in this matter to reflect that the defendant did enter pleas to burglary of the first degree to five counts as opposed to six counts."

Also page six of the sentencing transcript indicates the Court uses the term "first degree," and that is lines one through four. The defendant having been convicted by plea – this is as to Count 4 of the violation Section

459 of the Penal Code are burglary in the first degree.

That same page, pages six through seven, lay out the sentencing in this case, and Count 4, according to the sentencing transcript, indicates that the Court impose the upper term of six years on Count 4; on Count 5 the Court impose the middle term of four years consecutive but stayed 32 months. So what the Court really did was impose one third of the mid term and ran it consecutive. And as to Count 5, the middle term is what the Court imposed four years running concurrent.

If the Court looks at the 1982 Penal Code, Penal Code Section 461 lists the punishment for burglary in the first degree as two, four, and six years state prison. And then it goes on to say that punishment for burglary in the second degree county jail is appropriate not exceeding one year or state prison.

If the Court were to then look at Penal Code Section 18, it states that where a different punishment is [460] prescribed by law, every felony offense or an offense punishable by state prison is punishable by 16, two, or three years based on these two code sections, first degree residential burglary would be a two, four, six; second degree would be a 16, two, three. So the Court can see that the sentence imposed was a first degree residential burglary sentence.

In this case the minute order dated March 28, 1983, the abstract of judgment, the sentencing transcript, all indicate that the defendant pled guilty to first degree residential burglary, and he was sentenced according to first degree residential burglary.

Counsel now raises the question whether the defendant's convictions for first degree residential burglary qualify as strikes pursuant to Penal Code Section 667(d)(1) and Penal Code Section 1192.7.

So the People's position is that the defendant is asking this Court again to decide whether or not they are serious felonies.

The problem here is that although the information uses the term "first degree residential burglary," Penal Code Section 1192.7(c)(18) lists burglary of an inhabited dwelling as a prior which qualifies as a strike. And the People have shown that this is an inhabited dwelling, and that is what the defendant was convicted of by virtue of the definition in Penal Code Section 460 as defined in 1982.

In 1982, Penal Code Section 460 defines [461] burglary in the first degree as burglary of an inhabited dwelling committed in the nighttime, so it has to be an inhabited dwelling and committed in the nighttime in order to qualify as a first degree residential burglary in 1982.

Therefore, the two definitions match.

As the Court can see, the 1982 Penal Code Section 460 requires three elements to prove first degree residential burglary: One, a burglary; two, an inhabited dwelling; and, three, had to be committed in the nighttime.

That changed in 1983, and Penal Code Section 1192.7 – and I'm relying on a 1995 Code – only requires two elements, and that's burglary and an inhabited dwelling.

In Gonzales versus Superior Court, 1995, 37 Cal. Ap[p]. 4th 1302 as modified in 39 Cal. Ap[p]. 4th 583, A, B, and C, that case specifically held that the three strikes law applies to prior felony convictions which fit the definition of serious or violent on June 30th, 1993, even though they were neither serious nor violent felonies at the time of the prior conviction.

So in this case, based on the Gonzales case, all the People need to do is prove burglary and an inhabited dwelling pursuant to 1192.7. That is the controlling factor. And the People have proved that by, again in summary, by the minute order where the Court fixed the degree as first degree, by the information which indicates the defendant entered with intent to steal, by the transcript where the Court relies on facts where the Court [462] relies on a preliminary hearing transcript for a factual basis, the abstract of judgment

which lists it as a first degree, and the sentencing transcript dated April 26, 1983, and Penal Code Section 461 which defines residential burglary as burglary of an inhabited dwelling.

All these documents together show that the defendant pled guilty to a first degree residential burglary, and pursuant tot Section 460 which defines residential burglary as burglary of an inhabited dwelling, the People have met their requirements of 1192.7(c)(18).

And with that, we would submit it.

THE COURT: Mr. Cruz.

MR. CRUZ: I'll try and respond accordingly.

If I understand counsel's argument, she's saying if the Court looks at all the documents submitted to the Court, it will find defendant was sentenced according to the provisions for a first degree burglary.

We have often seen abstracts from state prison come back for clarification because the wrong sentence was imposed for the inappropriate charge. So do we just look at the sentence and say because the sentence is consistent with the first degree that it must be a first degree? Well, even counsel's own argument doesn't say that. And she says what's required to show is that there was a burglary of a, quote, unquote, inhabited dwelling. And if we look at all the documents that we have in this case, we don't have that.

The first document generated would have

been in fact the information, and the information does not [463] allege -- the information from San Joaquin County alleged that in fact the, quote, unquote, residences as they are called, were in fact inhabited dwellings.

The exact language contained in the informations are that it's a residence located at 3591 Quail Lakes Drive, No. 275, and that is almost the exact verbatim language in Count 5 and also in Count 6. Nothing indicating that this in fact is an inhabited dwelling.

So what counsel is trying to do is say if in fact defendant was sentenced as a first degree and there are some documents that say it was a residential burglary, because the definition for first degree burglary at the time included both nighttime and inhabited dwelling, that that should be sufficient to establish both of those elements.

Well, the one case that counsel has failed to give the Court is the case of Jackson, and Jackson says --

MS RUSZKOWSKI: Counsel, do you have the cite?

MR. CRUZ: Yes, I do.

Jackson is a California Supreme Court case. It's 37 Cal. 3d, 826. And Jackson held that in order to give retroactive effect to the enhancement provisions of Penal Code Section 667(c)(18) of 1192.7, it was interpreted as, quote, referring not to the specific criminal offenses, that is, whatever may be shown on the documents or the in fact minute orders but to the criminal conduct described therein and applicable whenever the prosecution separately pleads and proves that conduct.

[464] So what counsel is trying to say is if the charge says first degree, that is sufficient. That's not the law. The law says that conduct must in fact be charged and proven.

For example, if we take in fact the charging documents which are used in our own county - - if I might approach, you Honor.

THE COURT: Yes.

MS. RUSZKOWSKI: Counsel, could I see?

MR. CRUZ: I have a copy for counsel as well.

THE COURT: Thank you.

MR. CRUZ: Thank you.

The first case on top is a felony complaint filed by the People of San Bernardino County in the case of one Oscar Rolando Perez dnd Gilberto Martinez Careaga. In here it alleges a burglary in violation of Penal Code Section 459, a felony was committed by the names persons who did willfully and unlawfully enter a detached residential garage.

But what is a detached residential garage? We all know that that does not qualify as a first degree burglary because by law the garage must be attached to the house.

If counsel has done her homework, she would find that 459 first degree burglary has always been historically defined as a crime against habitation, not against property.

So it is in fact that it is an inhabited [465] dwelling which makes it a first degree. Not surprisingly, in 1982 what was required was a showing that in fact was an inhabited dwelling

which is not shown either in the information from San Joaquin County nor in the change of plea where there was never an allegation nor an admission that in fact this was an inhabited dwelling.

Do we then say take residential garage and say because the word "residential" is used, that that alone raises this to a first degree burglary? And the answer is, of course, no. We don't operate that way.

Looking at the next page of the felony complaint as filed by the District Attorney's Office in the West Valley, here is the most appropriate language that should be used for a first degree burglary. It alleges a first degree residential burglary, but they don't stop there. They state that this person, a Timothy William Norris, did willfully and unlawfully enter, quote, and inhabited dwelling house and trailer coach, inhabited portion of a building occupied by Elaine Carney. What they do is they in fact state the required elements to make it appropriate under (c)(18) because residential by itself does not qualify. (C)(18) of 1192.7, to make this a third strike does not use the word "residence." It says an inhabited dwelling. And that is the exact same language required in 1982.

And in addition to that, we have a named victim. We have Elaine Carney as being the person whose habitation was in fact violated.

[466] If we look at the information that was filed in San Joaquin County for Counts 4, 5, and 6, the Court will note there is no alleged victim in any of those counts as the D.A. has in fact done here, nor is there any mention in any of these counts that in fact was an inhabited dwelling.

If we look at the Penal Code Section for 1982, it was possible to commit a burglary of a house or an apartment. I realize a house can be bought and converted and can do other things that in fact be a residence. In my limited experience in life, I have never seen an apartment in use for other than in fact being a residence.

If we take the People's argument to its ultimate conclusion, if Kaufman and Broad were building homes down the street here on Civic Center Drive, and they were completed and ready for sale, and someone broke into those houses before they were sold and stole something from the house, would that be a residential burglary because it in fact is a residence? The answer is no because the People have to prove that it's an inhabited dwelling. So the fact alone that it's a residence does not make it a first degree burglary.

What if in fact that house had been in fact sold to a speculator who has no intention whatsoever of living in that house? He's going to rent it out. Would that make it a first degree burglary? Again no because the law requires that it be an inhabited dwelling.

And in fact the law on the case comes from our own 4th District. It is the case called Cardona, [467] 142 Cal. Ap[p]. 3d 481. Without a showing of an inhabited dwelling, it is insufficient for a first degree burglary.

And counsel's argument that simply using the word "residence" alone makes it a first degree burglary or in fact transposes it or somehow magically makes it into a first degree is insufficient.

The law requires the People as a fact of the conduct, not of the crime alleged, to in fact prove

that the residence was in fact inhabited.

The Penal Code Section 1982 required that allegation in the information and also that that allegation be pled at the change of plea.

Penal Code 1192.7(c)(18) -- if the Court recalls, I asked the People to in fact make an election to in fact state what it was exactly they were alleging was specific enough for this to make it a three strikes. They said (c)(18). I asked the Court for a special finding on that, and the Court did not.

I then was handed this morning, for example, a copy of the amended probation report, and the probation report does the same error that everybody else does. It says the jury also found true the allegation of P.C. Section 667(b) through (i). That was never given to the jury to decide whether or not these prior alleged offenses qualify under 1192.7(c)(18). They were told, here are the prior convictions, here's the exact language what the defendant pled to. The probation office goes off and says it's already been proven that these are in fact [468] strikes.

Counsel is also under the misapprehension that the Court has already ruled that these are in fact strikes. If that's the issue, then why do we give it to the jury to see if these are true writings? The jury decides whether or not in fact they were found pled and proven. The facts as given to the jury is what controls the Court here today.

What the jury found was the defendant had pled to the language contained in the information and pursuant to the plea. Is that sufficient at this time for the Court to find that those were first degree inhabited dwelling residences? And I submit to the Court that based upon what the jury

found and based upon the specific language contained in the People's exhibits, the Court is bound and cannot now find that somehow there is additional information which the Court can utilize to in fact overturn what the jury has found.

Even if we look at the additional documents, the minute order, the dockets, the Court knows from experience, first we have an information that informs the defendant of what he's charged with, and then we have a change of plea, and the defendant has no participation whatsoever in the preparation of a minute order nor an abstract of judgment nor any of those other documents in which counsel does not participate.

Now, People state that, well, counsel stated and the Court stated, but the question is, if we look at the change of plea entered by defendant and what he admitted, he [469] himself admitted -- he did not admit that it was residential.

Is a lawyer's statement binding upon the defendant? And in that regard, 1192.5 of the Penal Code requires that in fact there be a factual statement made by the Court to the defendant and defendant agree with that.

That's what happened in this case. The Court read the charges to the defendant, and the defendant admitted only what was in that information.

For the Court to say or for counsel to argue that whatever the defense lawyer stated would in fact be binding upon the defendant is contrary to the law.

And in fact for an attorney in 1982 to look at an information which is defective because it fails to show first degree burglary would in fact, based upon what the Court has right now before it, the

documents submitted by the People, that would be ineffective assistance of counsel. How could a lawyer in good faith in 1982 or even today stipulate that his defendant has pled to a first degree burglary when the information does not allege that? That's ineffective assistance of counsel.

If the Court wants some case to back that up with, I believe I do have two cases. The cases which in fact state that counsel may not do that is the case of People versus Watts, 67 Cal. Ap[p]. 3d 173, and also the case more importantly of Tigner, People versus Tigner, T-i-g-n-e-r, 133 Cal. Ap[p]. 3d 430, 435.

To summarize the crime or the facts of the [470] crime, the conduct of the crime, it needs to be stated in the information so that defendant has knowledge of what he's being charged with. 1192.5 requires the Court to inform the defendant and establish as a factual basis what it is defendant is in fact pleading to. That is found in the change of plea.

And what the Court read to the defendant and what he admitted was the same thing found in the information which is -- or does not contain any allegation of a nighttime entry nor an inhabited dwelling.

Counsel's argument is that, well, if defendant was sentenced to do a term which is consistent with first degree burglary, it doesn't matter what's on the information; it doesn't matter what's on the change of plea; the Court should ignore the information, ignore the change of plea, and look to what he was sentenced to do.

But the law in Jackson says no. The facts must be both supported by the People and shown

by the People -- in fact the specific language is that the conduct described therein when the prosecution separately pleads and proves that conduct, and I would note for the Court we're talking about conduct, not about an offense. So we can't take it and say it's a first degree burglary; do you plead guilty to that? That's insufficient. The Court must in fact take the elements separately and see if the defendant pleads to that. That was not charged. It was not admitted. And, therefore, it's not a first degree burglary.

And -- I have a lot more to say. I've been [471] doing a lot more research obviously.

THE COURT: I can tell. I'm impressed with both your arguments.

MR. CRUZ: I'll submit for right now.

THE COURT: Thank you for the work that both of you have put into this.

MS. RUSZKOWSKI: I've got the citations on a separate sheet of paper if the Court or court reporter needs them.

THE COURT: I do believe I have them. Do you have any response to what Mr. Cruz has said?

MS. RUSZKOWSKI: 1192.7 was not in existence in 1982. These offenses were committed in 1982. The defendant pled in 1983. The difference in the wording in the information is due to the fact in 1983 you didn't need nighttime. So that's

one of the differences.

And Penal Code Section 460 defines first degree residential burglary as burglary of an inhabited dwelling. There's a difference between what the People have to prove in trial, all the elements, and the fact there is a conviction.

I have not looked at the Jackson case. I'll look at it after we adjourn or recess.

But, you know, there's a difference between having to go and prove every single element and then proving that the defendant was convicted of first degree residential burglary, and I think all the paperwork in conjunction show [472] that it's first degree residential burglary, and 460 defines it as burglary of an inhabited dwelling.

Based on the Gonzales case previously cited, what is controlling is whether or not it would qualify as a serious offense at this time, and the fact that it's an inhabited dwelling by definition and it's a burglary qualifies.

And with that, I would submit it, you Honor.

MR. CRUZ: May I respond to that very quickly?

THE COURT: Yes.

MR. CRUZ: Counsel is correct. In 1982, 667 and 1192.7 did not exist. They were created after. There's a small problem with that. I don't know if the

Court realizes that. There was no such provisions for prior serious in 1982. They came later.

There's a small ex-post facto problem with that. Counsel has pointed it out. I think the Court should be aware of that.

Counsel is not, I think, contesting the fact that a 1982 offense, because it was pled to in 1983, therefore, the elements are different and are judged by 1983 standards. I don't think counsel is arguing that. I don't think she'll go that far to argue that. It's a 1982 offense. The law was changed in 1983 to eliminate nighttime. There was no change in whether or not it was an inhabited dwelling. That was both in 1982 and in 1983.

So the applicable standard, even though the plea was in 1983, was still to the charged offenses as the [473] law prescribed in 1982 which required nighttime.

Counsel's argument that -- I think she's saying that dwelling equals residence. I'm not sure she's really articulated that at this point. If she's saying that, then I have more cases for the Court to look at.

At this point I will just state this and make it very simple. If the Court wants to address that later on separately, we can do that. In 1982 it was required to show an inhabited dwelling house. In 1983 and in 1996 that's still required. There has been no change in that whatsoever.

What I have tried to show the Court from even the pleas, the felony complaint in this county, is simply saying residence by itself is not sufficient, and the D.A. knows that.

They have to in fact allege an inhabited dwelling, and the best way to do that is to say so

and also to put an alleged victim. Those things are not contained in any of the paperwork the Court has.

So my last argument basically is that the People are going to argument basically is that the People are going to argue that dwelling equals residence. That's not established by the Penal Code Section in 1982, nor today. Those are the elements that are required.

Cardona, of course, lays it out from the Fourth District that that has to be established. If the Court looks at detached residential garage, it's obviously simply saying residential garage, detached or otherwise, does not make that a first degree burglary. I'll leave it [474] up there. But if the Court wants to address the issue about whether or not residence is equal to dwelling, I have cases on that issue as well.

THE COURT: Thank you. All right. I'm going to take one case, and then I'll take the conference, and we'll come back at eleven o'clock, and I'll rule on this.

MS. RUSZKOWSKI: Does the Court want my Penal Codes? I mean they're not mine, but you are free to use one of mine if the Court would so desire, from 1982 and 1983.

THE COURT: Yes. That would be helpful.

(Recess.)

THE COURT: People versus Andrade, FWV-08781.

Mr. Andrade is present in custody represented by counsel. The People are represented.

I have read and considered the cases cited by counsel. I have reviewed the exhibits.

The motion for Arrest and Judgment is denied.

MR. CRUZ: May I get a chance to respond before the Court's ultimate ruling?

THE COURT: That was my ruling. Do you have more to offer?

MR. CRUZ: Well, I just wanted to know if the last question that I have for the Court was the People had not argued that residential was the same as inhabited dwelling, and I don't know if the Court wanted me to address that because I did have cases on that issue, and I wanted to address that if the Court felt that that was going to be an [475] issue that needed to be resolved.

THE COURT: Well, I have read the exhibits and the case law, and I am satisfied that that argument was addressed by Ms. Ruszkowski and by the cases that I have read, and I have had an opportunity, as I said, to read the exhibits. If you want to make your record, Mr. Cruz.

MR. CRUZ: Well, I wasn't quite sure because I asked the Court before if when the People made that argument, if that's an issue for the Court, I need to address it.

I can tell the Court very quickly that there are a couple of cases that would help the Court in that area if that is something the Court is going to

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THE COURT: Well, you did cite a couple of cases which discuss that --

MR. CRUZ: Well, I think People's - -

THE COURT: - - tangentially at least.

MR. CRUZ: Tangentially but not directly. There are a couple of cases that address that very specific issue. If the People made that argument and if the Court think they made that argument, I have some cases for the Court that say that's not proper, and I can tell the Court why that's not proper.

THE COURT: All right. Why don't you proceed.

MR. CRUZ: In an abundance of caution in case the Court is saying that in fact residential is the same as inhabited dwelling, I would note for the Court, the People talked about the case of Harrell. In Harrell, [475] H-a-r-r-e-l-l, the language that was used in Harrell that was gleaned by the Court from the information that was filed in the Superior Court was the language, quote, unquote, the residence of Steven Lewis. There was in fact a named victim of the residential burglary, first degree, vis-a-vis the inhabited dwelling portion. There it was somebody's residence.

I then went and looked at the cases that Harrell used in their reasoning, and the first case is the case of Deay, D-e-a-y, 194 Cal. Ap[p]. 3rd 280. Deay is a First Appellate opinion. There is a concurring opinion by Justice Sims. And

although he joins the majority in the ultimate resolution of the case, he felt compelled to write a concurring opinion on one specific issue, and that was whether or not residential should be evaluated with inhabited dwelling.

And his position was that that was improper for the Court to do so, that it was dicta for the Court to do so, and he expressly noted that there was language in the Deay case which was, quote, unquote, an inhabited dwelling and residence as contained in the information as well.

So he stated we need not say residence is the same thing as inhabited dwelling because we have in fact information before us that this was an inhabited dwelling.

Then he says -- we really talked about this already before -- look at the case of Brady, and Brady is 190 Cal. Ap[p]. 3d 124, where he says what brings the offenses within P.C. Section 667 and 1192.7 is the specific language [477] that there's a first degree burglary of, quote, an inhabited dwelling. Without that specific language, there is no inclusion within P.C. Section 667 and 1192.7.

And then, of course, he refers in Brady to the Jackson case in which he says that the People must plead separately and prove that conduct in order for it to fall within (c)(18).

So I just wanted to make sure that there was a lot of case law that stated simply saying residence or alleging residence by itself does not satisfy the provision of (c)(18) and of 1192.7 and P.C. 667 because what is required and what the specific language in Section (c)(18) states is burglary of an inhabited dwelling, not of a residence.

So I don't know if that makes any difference to the Court, but I wanted to make sure that that got addressed.

THE COURT: Thank you.
Do you have any response to that, counsel?

MS. RUSZKOWSKI: Yes, your Honor.

In 1982, Penal Code Section 460 and 461, the only time you could have a first degree residential burglary is if it was an inhabited dwelling. No other dwelling qualified. It had to be an inhabited dwelling.

And with that, we would submit it. I think the case law that counsel cited deals when the statute was expanded to include other types of dwelling. And in 1982 the only thing that qualified as a first degree was an [478] inhabited dwelling.

MR. CRUZ: And I don't disagree with counsel that what satisfied in 1982 a first degree burglary was an inhabited dwelling. But Jackson states that simply calling it a first degree burglary is insufficient to establish that in fact the prior is of an inhabited dwelling. Jackson requires that in fact there be language, and that's why I brought forward the information which the D.A.'s Office uses in this county, there must be an allegation of an inhabited dwelling and in fact an admission that it's an inhabited dwelling.

What counsel's argument has been has been to say if we look at everything but the information, if we look at everything but the

change of plea, we see that it seems to be a first degree burglary. She is exalting form over substance. She's saying, we have these boxes marked off presumably by a clerk somewhere, so, therefore, that in and of itself should be sufficient for the Court to say, if it looks like a first degree burglary, it should be a first degree burglary.

However, there's no support for that argument by counsel, not if she has evaluated Penal Code Section 1192.5 which states the requirement that the factual basis for the plea must be stated on the record. The record that we have here of the information and the change of plea is deficient as to those two aspects, nighttime and inhabited dwelling.

So the argument is if we look at the sentence [479] and we look at the minute order and we look at those things, that shows a first degree burglary. She hasn't answered the question: Does it show of an inhabited dwelling? She says, no, it shows a first degree burglary. We're not concerned with first degree or second degree. That is a red herring by counsel. A second degree residential burglary could also qualify as a prior. What has to be established is that this is in fact of an inhabited dwelling.

For example, January 26, 1996, the most recent case to talk about this was the case of People versus Moenius, M-o-e-n-i-u-s, and that was just published, and the Court will find it in the Daily Appellate Report.

MS. RUSZKOWSKI: Counsel, I reviewed that case. A petition for hearing has been granted April 11th, 1996.

MR. CRUZ: All right. The Court can then look at it in terms of just information. It has no controlling authority.

In that case it was an admission to the second degree residential burglary.

MS. RUSZKOWSKI: Your Honor, I believe if the case has been cited and hearing has been granted, I don't believe we can discuss it. -

MR. CRUZ: I believe the Court can discuss it. It has not been depublished. Therefore, it's on review, and the Court is looking at it. It doesn't mean that the Court cannot look at it nor refer to it when the issues are raised nor the issue be raised. [480]

THE COURT: I think I have enough information, Mr. Cruz, without going into that case at any rate.

Ms. Ruszkowski, do you have a response?

MS. RUSZKNOWSKI: Just very briefly, your Honor.

The People have looked at People versus Jackson, and what happened there was the prior alleged a second degree burglary, and the People were trying to prove that it was residential burglary. So they couldn't just look at the degree. They had to look into the words.

In our case it's consistent. It's one of our own convictions from the state of California, and the Court has the code, and the only thing that qualified was an inhabited dwelling

first degree residential burglary.

The other thing I would point out - - and this is very brief because the Court has already heard lots of argument -- was People versus Jackson itself, the case that counsel has cited, in a footnote indicated, Footnote No. 14, "Consequently, admissions or findings that a burglary was of a residence established on the record of conviction can be used in later proceedings to prove that the defendant has been previously convicted of such a serious felony."

And, you know, in the minute order dated March 28, 1983, the Court fixed the degree of offense as first degree. I would take that to be a finding by the Court that it was first degree, and it was based on the factual basis and the preliminary hearing transcript.

And with that, I would submit it. [481]

MR. CRUZ: As counsel has stated, one, we don't have a preliminary hearing transcript here; two, yeah, it was of a second degree in Jackson, a second degree residential burglary.

So the question came down: Is the word "residential" by itself talismanic? And the Court says, no, it's not. There has to be a showing of inhabitation because the offense is against an inhabited dwelling. So it was resolved and eventually coming down and showing there has to be specific allegations to that effect. There has

to be a factual record made to that effect.

I point out to the Court the two cases of Tigner and also of Witt in which there were statements made by other than the defendant. What are the weights of those statements? And the Court saw in Witt it was considered error for the Court to in fact take counsel's statement as in fact equating with a factual issue.

In Tigner they were even more adamant about the fact that that should not and could not be done and should never be done by counsel because the statute requires that it be done and a clear and open record. The clear and open record that we have is a change of plea. And the defendant was asked what is it that you in fact are admitting? What he admitted was that he had burglarized these places, but there's no allegation of nighttime or residence.

THE COURT: Thank you, Mr. Cruz. That argument doesn't change my initial ruling.

[482] Is there any other legal cause why judgment should not now be pronounced?

MR. CRUZ: No, your Honor. I don't have anything else to argue.

THE COURT: The Court makes no fi::dings under rule 413, 414, 421, or 423.

A motor vehicle was not involved in the commission of this offense.

The defendant does not have the present ability to pay for fees for appointed counsel.

The defendant does not have the

present ability to pay for presentencing investigation fees. I will strike the 504 dollar requirement.

Counsel, I have read and considered the supplemental report dated April 24, 1996.

Have you both received copies of that?

MR. CRUZ: I have, you Honor. As I stated before, it's in error, and so I object to both the original and supplemental.

THE COURT: And it's in error? Do you have anything in addition to what you said yesterday?

MR. CRUZ: Well, and what I said today.

THE COURT: And what you said today?

MR. CRUZ: No, your Honor.

THE COURT: All right. I also find that the defendant does not have the ability to pay for fees for the arresting agency. I will strike the requirement for the defendant to pay the 152 dollars.

[483] The defendant, Leandro Andrade, is ordered to pay a restitution fine pursuant to Penal Code Section 1204.4 in the amount of 200 dollars to be collected by the Department of Corrections for the offense of petty theft with a prior, a felony, two counts.

The defendant, Leandro Andrade, is ordered to pay a restitution fine pursuant to Penal Code Section 1202.45 in the amount of 200 dollars. That amount is suspended

pending successful completion of parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

The defendant, Leandro Andrade, is sentenced to the California State Prison as follows: Probation is denied. Count 1, petty theft with a prior in violation of section 666 of the Penal Code with a special enhancement of 667(b) through (i) of the Penal Code which was found true, the defendant is sentenced to the indeterminate sentence of life in prison of which he must serve 25 years, credit for time served in the amount of 109 actual days, 54 conduct days, for a total of 163 days, which may be followed by parole for a period of five to seven years.

Count 2, the defendant is sentenced to the California State Prison for the offense of petty theft with a prior in violation of Section 667 of the Penal Code with a special enhancement of 667(b) through (i) of the Penal Code found true, and the defendant is sentenced in Count 2 for the indeterminate sentence of life in prison of which he must serve 25 years, that sentence to be consecutive to [484] Count 1, for a total of life in prison, of which he must serve 50 years, credit for Count 2, a matter of four actual days, two conduct days, for a total of six days.

This may be followed by a period of parole of from five to seven years.

This sentence is pursuant to Penal Code Section 667(e)(2).

Mr. Andrade, you have an absolute right to appeal from the judgment just rendered against you and the sentence just rendered against you.

In that regard you must file with the Clerk of this Court, not the Court of Appeal, a written notice of appeal within 60 days from today's date.

You must state whether you are appealing the entire judgment or a portion thereof.

You have the right to have any attorney represent you at all stages of the appeal process. If you are indigent, the Court will appoint an attorney to represent you free of charge.

In that regard you must keep the Court informed of your present location of your present location or address at all times.

You have the right to have a complete transcript of the proceedings for purposes of review. This transcript will be provided free of charge if you are indigent.

Do you understand your appellate rights as I have explained them to you?

THE DEFENDANT: Yes, ma'am. [485]

THE COURT: Thank you.

MR. CRUZ: Your Honor, may I ask the Court two things?

THE COURT: Yes.

MR. CRUZ: One, I would ask the Court to in fact, if it's

going to do the sentencing that it just stated, make Count 2 concurrent.

I would also invite the Court to in fact state its findings as to the priors on the record since we will file an appeal, and I think it will be instrumental for the Court of Appeal to in fact have something to look on.

THE COURT: I am going to deny your request to have the sentence served concurrently because it's my understanding it's consecutive required.

Also I have already given you findings under Penal Code Section 1192.7. I made that ruling during the trial. So I don't think any further findings at this time are required, and I have made my ruling on your request.

MR. CRUZ: All right, your Honor.

THE COURT: Thank you.

MS. RUSZKOWSKI: Thank you, your Honor.

(Adjourned.)